

LINCOLN/LANCASTER COUNTY PLANNING STAFF REPORT

for FEBRUARY 16, 2005 PLANNING COMMISSION MEETING

P.A.S.: Miscellaneous No. 05002

PROPOSAL: An amendment to **Rule 17. “Ex Parte” Communications** of the Lincoln City-Lancaster County Planning Commission Rules and Procedures.

CONCLUSION: Alternative A represents the amendment to Rule 17 which the Planning Commission directed be brought forward in response to the request by the City-County Common. Alternative B represents additional amendments to Rule 17 proposed by staff. Alternative B provides further clarification of the meaning and importance of the proper disclosure of “ex parte” communications.

<u>RECOMMENDATION:</u>	Approval of the staff proposal, Alternative B
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GENERAL INFORMATION:

HISTORY: Rule 17 concerning “ex parte” communications was adopted and incorporated into the Planning Commission Rules and Procedures on July 20, 1994.

ANALYSIS:

1. On January 4, 2005, the City-County Common directed the Director of Planning to submit a proposed amendment (initiated by County Commissioner Bernie Heier) to Rule 17 of the Planning Commission Rules and Procedures regarding “ex parte” communications, as follows:

Any communication between a Lincoln-Lancaster County Planning Commission Member and a City or County agency, department, other member of the Planning Commission or any individual concerning an application shall be noted on public record by the department, agency and Planning Commission Member at the next meeting of the Planning Commission. Additionally, this information must be shared with the applicant and attached to the application being discussed.

An ex-parte communication roll call will be taken by the Chairperson at the beginning of each Planning Commission meeting.

2. On January 19, 2005, the Planning Commission discussed the proposed amendment at a noon meeting with Commissioners Carlson, Marvin, Bills-Strand, Carroll and Sunderman present (Larson, Pearson, Krieser and Taylor were absent). Minutes of the meeting are attached.
3. Upon review of the existing "ex parte" communication rule and discussion of the proposed amendment, the Planning Commission directed the Director of Planning to bring forward an amendment to paragraph #2 (Alternative A attached hereto), as follows:
 2. If there are ex parte contacts with ~~the applicant or opponent~~ anyone that results in new information, such contacts and the information should be disclosed on the record to give the other side the opportunity to refute. After a public hearing is closed, such contacts should be kept to a minimum.
4. It was the general consensus of those members present that the remainder of the "ex parte" communication rule is sufficient and generally meets the intent of proper disclosure.
5. Upon further review by the staff, it was determined that there are other portions of the "ex parte" communication rule that merit further amendment for clarification and should be considered by the Planning Commission. The additional amendments proposed by the staff are attached as Alternative B.

Prepared by:

Jean Walker, 441-6365, jwalker@lincoln.ne.gov
Administrative Officer
Planning Department

DATE: February 3, 2005

APPLICANT: Marvin S. Krout
Director of Planning

CONTACT: Marvin S. Krout
Director of Planning

Alternative A
MISCELLANEOUS NO. 05002
Amendment proposed as directed by Planning Commission
on January 19, 2005

Rule 17. "Ex Parte" Communications (Resolution No. PC-00157, 7/20/94)

The Planning Commission has now been given more authority in certain situations and the advisory role has been converted to an administrative, legislative or quasi-judicial role, i.e. use permits, special permits, final plats.

With quasi-judicial actions, the requirements of procedural due process necessitate a fair hearing before a reasonably impartial body. Any decision must be based upon what is in the official public record. Ex parte communications could create legal problems if the courts feel that the ex parte contacts have biased the commission holding the hearing.

Ex parte communications are defined as talking, either in person or by phone, to a commission member when the other side is not present or presenting information to the member which the other side does not receive.

Many hearings before the Planning Commission are legislative and strictly advisory in nature. Though not quasi-judicial, these hearings should also be conducted in a fair manner. Everyone should be operating on the same base of information in making a decision.

The Planning Commission recognizes that the prevention of ex parte communications may be impossible. In order to do our best to insure a fair and open hearing and decision making process, the Planning Commission will use the following protocol when involved in contacts with the public outside of the public hearing:

1. Keep such contacts to a minimum in those areas of concern, especially when the issue involves final action by the Planning Commission.
2. If there are ex parte contacts with ~~the applicant or opponent~~ anyone that results in new information, such contacts and the information should be disclosed on the record to give the other side the opportunity to refute. After a public hearing is closed, such contacts should be kept to a minimum.
3. On final action items that are likely to generate continued discussion between the hearing and the vote, the Commission should consider continuing the public hearing.
4. The Commissioners will request that comments or additional information be put in writing and sent to the Planning Department for distribution to all Commissioners.

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Alternative B
MISCELLANEOUS NO. 05002
Planning staff amendment proposal

Rule 17. "Ex Parte" Communications (Resolution No. PC-00157, 7/20/94)

The Planning Commission has now been given more authority in certain situations and the advisory role has been converted to an administrative, legislative or quasi-judicial role, i.e. preliminary plats, community unit plans, waivers of design standards, modifications to the Land Subdivision Ordinance, use permits, special permits, county final plats.

With quasi-judicial actions, the requirements of procedural due process necessitate a fair hearing before a reasonably impartial body. Any decision must be based upon what is in the official public record. Ex parte communications could create legal problems if the courts feel that the ex parte contacts have biased the commission holding the hearing.

Ex parte communications are defined as ~~talking, either in person or by phone, to a commission member when the other side is not present or presenting information to the member which the other side does not receive~~ information that anyone shares with Commission members outside of the public hearing.

Many hearings before the Planning Commission are legislative and strictly advisory in nature. Though not quasi-judicial, these hearings should also be conducted in a fair manner. Everyone should be operating on the same base of information in making a decision.

The Planning Commission recognizes that the prevention of ex parte communications may be impossible. In order to do our best to insure a fair and open hearing and decision making process, the Planning Commission will use the following protocol when involved in contacts with the public outside of the public hearing:

1. ~~Keep such contacts to a minimum in those areas of concern, especially when the issue involves final action by the Planning Commission. The Commission members should not solicit ex parte communications. The Commission members should politely refuse to discuss the proposal with anyone and request that any information be provided in writing prior to the public hearing or at the public hearing.~~
2. If there are ex parte contacts with ~~the applicant or opponent~~ anyone that results in new information, such contacts and the information should be disclosed on the record before the public hearing to give the other side the opportunity to refute. After a public hearing is closed, ~~such contacts should be kept to a minimum~~ the Commission members should refuse to discuss the merits of the application, except among themselves during the debate at the Planning Commission meeting.
3. ~~On final action items that are likely to generate continued discussion between the hearing and the vote, the Commission should consider~~

~~continuing the public hearing.~~ The public hearing shall not be closed until a decision vote by the Commission.

4. The Commissioners will request that comments or additional information not presented at the public hearing be put in writing and sent to the Planning Department for distribution to all Commissioners and interested parties.

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PLANNING COMMISSION RECORD

Briefing Session

NAME OF GROUP: PLANNING COMMISSION

DATE, TIME AND PLACE OF MEETING: Wednesday, January 19, 2005, 12:00 Noon, Room 113, First Floor, County-City Building, 555 S. 10th Street, Lincoln, Nebraska

MEMBERS IN ATTENDANCE: Jon Carlson, Dan Marvin, Mary Bills-Strand, Gene Carroll and Lynn Sunderman (Roger Larson, Melinda Pearson, Gerry Krieser and Tommy Taylor absent). Marvin Krout, Mike DeKalb, Ray Hill, Brian Will, Greg Czaplewski and Jean Walker of the Planning Department; Rick Peo of the City Law Department; and Kristy Mundt of the County Attorney's office.

STATED PURPOSE: Discussion on City-County Common request (initiated by County Commissioner Bernie Heier) to amend the Planning Commission Rules and Procedures on "Ex Parte" Communications.

Marvin Krout, Director of Planning, explained that at the last meeting of the City-County Common (Mayor, City Council and County Board), the attached proposed wording on "ex parte communication" was submitted by County Commissioner Bernie Heier. The Common has requested that the Planning Commission consider amending their Rules and Procedures, adopting this proposed language. Marvin Krout did also meet with Commissioner Heier individually for clarification of the proposed language. Commissioner Heier's main objective is to formalize what the Planning Commission Rules and Procedures already say about needing to disclose ex parte communications, and he is asking that the Planning Commission put in writing that the ex parte communications could include communications with staff as well as with the applicant, the agent, neighbors, etc. The language also suggests a roll call vote on each project as to whether or not a Planning Commission member had any ex parte communications. In general, the request is that the Planning Commission members pay closer attention to ex parte communications and the disclosure of the same. The main purpose is to make sure that everyone has the same information in considering a case. If a Commissioner calls and asks staff a question, that information should be shared with the rest of the Planning Commission.

The Common has requested Marvin Krout to report back at their March meeting.

Rick Peo of the City Law Department clarified that information is considered "ex parte" when the application has been filed of record or actually appears on the agenda. Discussions or communications prior to that time would not be considered "ex parte".

When the application is filed, then evidence is starting to be presented and that is when everyone needs to have a level playing field. What is being decided is based on the public record. The Commissioners should try to avoid relying on earlier information, or if a Commissioner believes that earlier information is pertinent, then it should be voluntarily disclosed.

Carlson believes it is a strength to have the Commission be involved in the community and bring different backgrounds of knowledge. There is a lot more exchange and a lot more sharing of information during the debate and discussion. He believes the Planning Commission Rules and Procedures are very sufficient as they stand. He suggested communicating back to the Commission and thanking them for giving the Planning Commission the opportunity to review and investigate the rules.

Bills-Strand suggested if there is a specific problem that initiated this request, then that specific problem should be brought to the Planning Commission and they will deal with it. Otherwise, she agrees that the Rules and Procedures are sufficient as they exist today.

Carroll does not believe the roll call for ex parte is necessary. The Commissioners know and understand what they are expected to do. Carroll does not believe the rules need to be changed.

Upon further discussion, it was agreed that paragraph #2 under Rule 17 should be revised as follows:

2. If there are ex parte contacts with ~~the applicant or opponent~~ anyone that result in new information, such contacts and the information should be disclosed on the record to give the other side the opportunity to refute. After a public hearing is closed, such contacts should be kept to a minimum.

Krout believes that if the whole idea is fairness and due process in quasi-judicial proceedings, then the final decision maker should be held as accountable as the recommending body. However, it was confirmed that the County Board and the City Council do not have any formal requirements to disclose any ex parte contacts. There was inquiry as to whether the Board of Zoning Appeals bylaws included anything about ex parte communications.

Carlson believes that the Planning Commission members are actually more thorough than the bylaws require. In fact, there is nothing on today's agenda that is quasi-judicial in nature; however, the question about ex parte communications is asked on each and every agenda item.

Mr. Krout will prepare the minor amendment and place it on a future Planning Commission agenda for discussion and action.

Bills-Strand suggested that the Commission members not attend neighborhood meetings if the application being discussed has been submitted and filed in the Planning Department.

The meeting was adjourned at 12:35 p.m.

Respectfully submitted,

Jean Walker
Administrative Office, Planning Dept.

I:\pc\minutes\2005\pc0119.05 ex parte discussion

Attachments

Ex-Parte Communication

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